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No. 84-798

In the Supreme Court of the United States

OCTOBER TERM, 1984

GEORGE S. McLEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, on the government's appeal from the district court's order dismissing the substantive counts of the indictment, the court of appeals correctly declined to consider petitioner's challenge to the district court's denial of his motion to dismiss the conspiracy count.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 738 F.2d 655. The opinion of the district court (Pet. App. 17a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1984, and a petition for rehearing was denied on September 19, 1984 (Pet. App. 16a). The petition for a writ of certiorari was filed on November 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1.a. A 49-count indictment was filed on October 22, 1982, in the United States District Court for the Southern District of Texas. It charged Crawford Enterprises, Inc., (CEI) and nine individuals, including petitioner, with conspiracy to use interstate and foreign instrumentalities for

the purpose of bribing officials of Pemex, an oil company owned by the Republic of Mexico (Count 1), 47 completed substantive acts (Counts 2-48), and obstruction of justice (Count 49), in violation of 18 U.S.C. 371, 15 U.S.C. 78dd-2(a)(1) and (3), 15 U.S.C. 78dd-2(b), and 18 U.S.C. 1503. Petitioner was named in the conspiracy count and in 43 of the counts charging substantive violations of 15 U.S.C. 78dd-2, a section of the Foreign Corrupt Practices Act (FCPA). In those 43 counts, petitioner was alleged to have aided and abetted seven of his co-defendants in the criminal conduct. See 18 U.S.C. 2.

The indictment alleged that petitioner was a vice-president of Solar Turbines International, a division of International Harvester Company, which was not named as a defendant in the indictment. However, on November 18, 1982, International Harvester entered a plea of guilty to a one-count information charging conspiracy to violate the FCPA, in violation of 18 U.S.C. 371. One condition of the plea agreement was that International Harvester would not be charged with any other offenses arising out of its sales to CEI and Pemex. Pet. App. 4a-6a.

b. Prior to his trial, petitioner filed a motion to dismiss all counts of the indictment against him.[1] Petitioner contended that the theory of criminal liability advanced by the government was premised solely upon conduct performed by petitioner in his capacity as International Harvester's employee. Petitioner then cited certain penalty provisions of the FCPA, commonly known collectively as the Eckhardt Amendment, that set forth maximum prison terms

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[1]Petitioner was joined in this motion by co-defendant Luis A. Uriarte. On September 29, 1983, Uriarte entered a plea of guilty to an information charging him with being an accessory after the fact with respect to one of the violations of the FCPA. See 18 U.S.C. 3. The remaining charges against Uriarte were dismissed. Pet. App. 8a n.3.

and fines for employees and are applicable only if the employer "is found to have violated" the FCPA. 15 U.S.C. 78dd-2(b)(3) and 78ff(c)(3). Petitioner argued that the Eckhardt Amendment requires that a corporate employer actually be convicted of a violation of the FCPA as a precondition to convicting an employee. In this case, petitioner pointed out that his employer, International Harvester, had been convicted only of a violation of 18 U.S.C. 371, which is not a provision of the FCPA, and that under the plea agreement, International Harvester would not be charged with a violation of any section of the FCPA. Because his employer had not been and would not be convicted of violating the FCPA, petitioner argued that, under 15 U.S.C. 78dd-2(b)(3), he should be relieved of all criminal liability as well. Following a hearing, the district court held that all substantive FCPA counts of the indictment must be dismissed on this ground, but not the conspiracy count (Pet. App. 17a-18a).

2. The government appealed the order of the district court insofar as it dismissed the substantive counts of the indictment, but petitioner did not take a cross-appeal from that order insofar as it denied his motion to dismiss the conspiracy count. The court of appeals affirmed the dismissal of the substantive FCPA charges against petitioner. Pet. App. 1a-15a.[2] However, the court denied petitioner's request that it also order the district court to dismiss the conspiracy count. It explained (Pet. App. 15a n.10):

> McLean urges us to invoke "our equitable powers" and dismiss the conspiracy count still pending against him. Since McLean has not filed a cross-appeal, this issue is not properly before us. In addition, a denial of a motion to dismiss an indictment is not ordinarily a

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[2]The government has not sought further review of the court of appeals' decision affirming the dismissal of the substantive counts.

final decision for purposes of 28 U.S.C. § 1291 (1976) and is therefore unappealable. *See United States v. Sisk*, 629 F.2d 1174, 1180 (6th Cir. 1980, *cert. denied*, 449 U.S. 1084, 101 S. Ct. 871, 66 L. Ed. 2d 809 (1981)); *Abney* v. *U.S.*, 431 U.S. 651, 662-63, 97 S. Ct. 2034, 2041-42, 52 L. Ed. 2d 651 (1977); *U.S. v. Rey*, 641 F.2d 222, 224 (5th Cir. 1981).

ARGUMENT

1. Petitioner contends (Pet. 16-20) that the court of appeals erred in ruling that because he did not take a cross-appeal, it would not consider his challenge to the denial of his motion to dismiss the conspiracy count. Contrary to petitioner's contention, however, the court of appeals' decision is consistent with a long and unbroken line of decisions of this Court holding that, in the absence of a cross-appeal or cross-petition, a prevailing party may not attack a portion of a judgment below that is adverse to him, with a view either to enlarging his own rights or restricting the rights of his opponent. See, *e.g.*, *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); *Alaska Industrial Bd.* v. *Chugach Electric Ass,n*, 356 U.S. 320, 324-325 (1958); *Penfield Co.* v. *SEC*, 330 U.S. 585, 594 (1947); *LeTulle* v. *Scofield*, 308 U.S. 415, 421-422 (1940); *Helvering* v. *Pfeiffer*, 302 U.S. 247, 250-251 (1937); *Langnes* v. *Green*, 282 U.S. 531, 538-539 (1931); *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924). "The rule is inveterate and certain." *Morley Constitution Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191 (1937).

Petitioner's reliance upon *French* v. *Estelle*, 696 F.2d 318 (5th Cir. 1982), is misplaced. That case merely holds, consistently with well established precedent, that the ruling of a lower court may be *affirmed* on any ground supported by the record, even though the court below did not consider it. 696 F.2d at 319-320. See *United States* v. *New York Telephone Co., supra; Helvering* v. *Pfeiffer, supra; Langnes*

v. *Green, supra*. It does not suggest, as petitioner urges here, that a portion of a judgment may be reversed by a court of appeals if the party aggrieved has not filed a cross-appeal challenging that aspect of the judgment.[3]

2. As the court of appeals correctly concluded, even if petitioner had attempted to take a cross-appeal, his claim would be premature. Petitioner's asserted right of appeal must rest on 28 U.S.C. 1291, which limits the jurisdiction of the courts of appeals to review of "final decisions of the district courts." The determination in this case by the district court that the conspiracy count survives despite the absence of a conviction of petitioner's employer of a substantive violation of the FCPA clearly is not a "final decision" that is subject to appellate review under 28 U.S.C. 1291 prior to the entry of a final judgment.

To be sure, a narrow exception to the final judgment rule has been recognized for an order that conclusively determines the disputed question, resolves an important issue completely separate from the merits of the action, and is effectively unreviewable on appeal from a final judgment. *Flanagan* v. *United States*, No. 82-374 (Feb. 21, 1984), slip op. 6; *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). However, as this Court stressed in *Flanagan*, the collateral order exception to the final judgment rule must be interpreted with the "utmost strictness" in criminal cases. Slip op. 6. In this case, we may assume arguendo that petitioner's claim that the indictment does not charge a prosecutable offense satisfies the first two prongs of the

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[3]Petitioner, a non-indigent non-lawyer who has persisted in representing himself, cannot escape the application of the cross-appeal requirement by claiming ignorance of the rules as a result of a lack of legal training (Pet. 19). Petitioner is "literate, competent, and understanding, and * * * [is] voluntarily exercising his informed free will." *Faretta* v. *California*, 422 U.S. 806, 835 (1975). He has assumed the risk of noncompliance with well established procedural rules.

collateral order test. But his claim fails to satisfy the third prong, because it plainly is not effectively unreviewable on appeal from a final judgment.

Petitioner's argument that the conspiracy count should be dismissed implicates no constitutional provision; it presents a straightforward question of statutory construction. It is true that because the district court's construction of the statute differs from that urged by petitioner, he will be required to stand trial on that count. But if he is convicted, petitioner can renew his Eckhardt Amendment defense on appeal from that judgment of conviction. If the court of appeals agrees at that time that the conviction cannot stand because petitioner's employer was not convicted of a substantive violation of the FCPA, it can afford full relief by reversing the conviction. Review prior to that time therefore would be interlocutory and premature. *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982); *United States* v. *Harper*, 729 F.2d 1216 (9th Cir. 1984); *United States* v. *Hashagen*, 716 F.2d 1454 (5th Cir. 1983); *United States* v. *Yellow Freight System, Inc.*, 637 F.2d 1248, 1251 (9th Cir. 1980), cert. denied, 454 U.S. 815 (1981).

Petitioner attempts (Pet. 16-17) to compare his statutory claim to the Double Jeopardy claim involved in *Abney* v. *United States*, 431 U.S. 651 (1977), which the Court held could be raised on appeal prior to entry of a final judgment. However, the Double Jeopardy Clause, like the Speech or Debate Clause involved in *Helstoski* v. *Meanor*, 442 U.S. 500 (1979), establishes a constitutional right not to be tried. See *Flanagan* v. *United States*, slip op. 7. That right obviously would be "irretrievably lost if review were postponed until trial is completed" (*ibid.*). By contrast, the statutory provision upon which petitioner relies, 15 U.S.C. 78ff(c)(3), does not by its terms confer a right not to be tried. It merely conditions an employee's conviction and sentence upon a finding that the employer violated the FCPA. See

also H.R. Rep. 95-640, 95th Cong., 1st Sess. 11 (1977), quoted at Pet. App. 11a (an agent "shall not be subject to the penalties of the bill" unless it is shown that the employer violated the Act).

3. In any event, even if petitioner's claim had been properly presented to the court of appeals, he would not have been entitled to relief. The court of appeals held that there was not an adequate predicate for prosecuting him for substantive violations of the FCPA, because the FCPA expressly requires a finding that the employer violated the FCPA itself, yet International Harvester was convicted of violating only the general conspiracy statute, 18 U.S.C. 371, which is not part of the FCPA. But the remaining count of the indictment still pending in the district court, unlike the dismissed counts, does not charge petitioner with violating the FCPA. It charges him with violating 18 U.S.C. 371, which does not contain any similar requirement that his employer be found to have violated a substantive provision of the FCPA or any other statute.

Petitioner argues, however, that the conspiracy count under 18 U.S.C. 371 is based on nothing more than "derivative liability, aiding and abetting, that is barred from prosecution" by the Eckhardt Amendment. Pet. 15. There is no merit to this argument. Conspiracy is universally recognized as an offense separate and distinct from the substantive criminal conduct that constitutes the object of the conspiracy. *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975); *Pinkerton* v. *United States*, 328 U.S. 640 (1946). This is not a novel proposition. Congress, which is "predominantly a lawyers' body," *Callanan* v. *United States*, 364 U.S. 587, 594 (1961), presumably was familiar with the distinct nature of conspiracy and substantive charges when it enacted the FCPA. See *Albernaz* v. *United States*, 450 U.S. 333, 341 (1981). If Congress also had desired to exempt employees from being convicted for participating in a

conspiracy that had as an object conduct that would violate the FCPA unless their employers had first been found to have actually violated the FCPA, it surely knew how to say so. But nothing in the FPCA manifests such an intent. And even assuming the propriety of an inquiry into the legislative history when the language of the statute is unambiguous (but see *Albernaz* v. *United States*, 450 U.S. at 336), petitioner has pointed to no clearly expressed legislative intention that is contrary to the statutory language and is supportive of his position. *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Petitioner is in any event impaled upon the horns of a dilemma in the circumstances of this case. Either a Section 371 conspiracy to violate the FCPA is properly to be treated as a form of FCPA offense, or it is not to be so treated. If International Harvester's conspiracy conviction, as the court of appeals concluded, does not satisfy the Eckhardt Amendment, then it necessarily follows that the same charge against petitioner is not sheltered by the Amendment either. Conversely if, as petitioner now seems to contend, the conspiracy charge against him should be treated functionally as coming within the FCPA and the Eckhardt Amendment, then the company's conviction removes whatever shield the Amendment would have provided had the company not been convicted. But the only possible consequence of that view is not that the conspiracy charge should be dismissed, but that the courts below may have erred in dismissing the substantive charges against petitioner.[4]

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[4]We have been informed by the Justice Department attorney responsible for the prosecution that the trial, which has not been stayed, is scheduled to begin on March 4, 1985.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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